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Member of Congress, 1995-2003

TESTIMONY SUBMITTED TO THE HOUSE JUDICIARY COMMITTEE, SUBCOMMITTEE ON THE CONSTITUTION

BY

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Thank you for offering me the opportunity to tender my views on the Defense of Marriage Act, which I authored, and the current controversy over same-sex marriages.

My name is Bob Barr and, until last year, I had the pleasure and the honor of serving in Congress, and on this august Committee and Subcommittee, as the representative from the Seventh District of Georgia.

Prior to my tenure in Congress, I served as a presidentially-appointed United States Attorney for the Northern District of Georgia; as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice.

Currently, I am again a practicing attorney, *Of Counsel* to the Law Offices of Edwin Marger, in Jasper, Georgia. I also hold the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union. I am also on the boards of the National Rifle Association and the Patrick Henry Center, serve on the Legal Advisory Board of the Southeastern Legal Foundation, and consult on privacy issues for the American Civil Liberties Union.

Before I begin, I would like to commend the subcommittee for its willingness to thoroughly examine this issue. In the midst of a heated presidential campaign, it would be very easy for this debate to suffer from the vague sound-bites and generalized talking points that surround so many debates these days.

The courage and conscientiousness of this Subcommittee will help to ensure that the American people get the full story on these proposed constitutional amendments.

I appear before you today as a proud conservative whose public career has long been one dedicated to preserving our fundamental constitutional freedoms and ensuring that basic moral norms in America are not abandoned in the face of a creeping "contextual morality," especially among our young.

To both these ends, I authored the Defense of Marriage Act, which was signed into law by President Clinton in 1996. DOMA, as it's commonly known, was designed to provide individual states individual autonomy in deciding how to recognize marriages and other unions within their borders. For the purposes of *federal law only*, DOMA codified marriage as a heterosexual union.

In the states, it allowed legislatures the latitude to decide how to deal with marriage rights themselves, but ensured that no one state could *force* another to recognize marriages of same-sex couples.

It was a reasonable and balanced measure, mindful of federal interests but respectful of principles of federalism. It has never been successfully challenged.

Importantly, at the time of its drafting, many of my colleagues in Congress tried to make DOMA a pro-active, punitive law that would force a particular definition of marriage on the states.

Their desired measure would have been the statutory equivalent of the main constitutional ban on any legal recognition of same-sex and unmarried couples that was pending before you until last week, and which has been replaced by a slightly modified substitute.

We rejected such an approach then, and we ought to now as well. Simply put, DOMA was meant to *preserve* federalism, not to dictate morals from Washington. In our federal system, the moral norms of a given state should govern its laws in those areas where the Constitution confers sovereign power to the states or does not expressly grant it to the federal government.

Moreover, the contemporary debate over marriage rights isn't even about the fundamentals of marriage, it is about legal definitions and semantics.

Certainly, religious conceptions of marriage are sacrosanct and should remain so -- the government should have no say whatsoever in how a given faith chooses to recognize marriage among its adherents. However, how a state decides to dole out hospital visitation rights or insurance benefits, and what it decides to call these arrangements, are and should be a matter of state law; these are legal relationships involving, in many instances, disbursement of state monies.

And, part of federalism means that states have the right to make bad decisions – even on the issue of who can get married in the state.

DOMA struck this balance, and continues to do so. Even with the maverick actions of a few liberal judges and rogue public officials, this balance remains in place. Already, we are seeing state supreme courts and state legislatures refusing to go along with any broad changes in their marriage laws.

By many accounts, it looks like reasoned argument and democratic deliberation, not unilateral action by misguided activists, will win the day in the marriage debate.

That said, however, we also cannot repeat Gavin Newsomian mistakes by going too far in the opposite direction. The Massachusetts Supreme Court and the mayor of San Francisco were wrong because they took the decision-making process out of the hands of the people.

Matters of great importance, such as marriage, need to reflect the will of the people, and resolved within the democratic process. People need to be able to weigh the merits of the opposing arguments, and vote on those merits. They do not deserve – as Americans – to have one side foisted on them by fiat.

However, that is what social conservatives are also trying to do; and even more inexcusable, they are trying to do it using the Constitution as a hammer.

To be clear, I am absolutely not a supporter of granting marriage rights for same-sex couples any sort of legal recognition, which makes my decision to oppose the FMA all the harder. I do not enjoy opposing people who I agree with in substance on matters of process.

Yet, the Constitution is worth that lonely stand.

There are two general approaches to banning any legal benefits for homosexual couples through a constitutional amendment. Both are troubling and for similar reasons.

The first is the compromise amendment that, according to *National Review*, Senator Orrin Hatch from Utah is considering introducing. It would effectively take DOMA and put it in the Constitution. Unfortunately, even though DOMA is an appropriate federal statute, it is not appropriate for the Constitution.

The reason is quite simple.

The intended purpose of the amendment is to keep "activist judges" from imposing a new definition of marriage on the unwilling residents of a given state.

It would likely read something like this: "Civil marriage shall be defined in each state by the legislature or the citizens thereof. Nothing in this Constitution shall be construed to require that marriage or its benefits be extended to any union other than that of a man and a woman."

However, put more simply, the amendment would remove the state courts from the equation altogether, making the measure, ironically, an abridgement of state authority vis-à-vis the federal government, not a fortifier.

While certainly we conservatives are exasperated by some of the over-the-top actions of the state courts, that does not, and should not, mean that we should do away with entire strata of our centuries-old legal system.

Although the state-level judiciary is not supposed to make law, as did the Massachusetts Supreme Court, it is essential it be allowed to interpret law, settle disputes when statutes conflict, and decide the constitutionality of state laws. Transpose another contested issue – like gun control perhaps – and the danger of removing state courts, skilled in state laws and local ways of doing things, becomes apparent.

If we remove even one puzzle piece from the federalist design, we remove checks and balances that keep power diffuse among the states -- and with the governing bodies that are closest to the people being governed.

So, in sum, the Hatch Amendment at least superficially looks close, but can get no cigar from those of us who object on strong federalism grounds to this seemingly modest first approach to a marriage amendment.

The second, more wide-ranging approach is reflected in the measures put forward by Representative Marilyn Musgrave and Senator Wayne Allard, both from Colorado. Both Representative Musgrave and Senator Allard initially put forward a measure that would forever deny unmarried couples – be they homosexual or heterosexual -- any and all of the "legal incidents" of marriage. It would have completely stolen this decision away from state legislatures and residents where it belongs.

Just last week, Representative Musgrave and Senator Allard introduced a substitute, which they presumably feel has a greater chance at passage.

The sole difference between it and the previous proposal is that while it preempts state and federal constitutions from being interpreted in such a way as to guarantee the "legal incidents" of marriage to same-sex couples, it would permit state legislatures and executive officials to confer these benefits. But, of course, it still absolutely bars states from extending marriage rights to same-sex couples.

Once again, unfortunately, the Musgrave-Allard substitute measure, which I will still refer to as the Federal Marriage Amendment, misses the basic point. This second approach entails putting an actual legal definition of marriage in the Constitution, which still involves taking that power away from the states.

I, along with many other conservative opinion leaders and lawmakers, strongly oppose such a measure for three main reasons.

First, by moving what has traditionally been a state prerogative – local marriage laws -- to the federal government, it is in direct violation of the principles of federalism. Second, in treating the Constitution as an appropriate place to impose publicly contested social policies, it would cheapen the sacrosanct nature of that document, opening the door to future meddling by liberals and conservatives. Third, it is unnecessary so long as DOMA is in force.

I will deal with each of these objections in order.

First, marriage is a quintessential state issue. For the purposes of federal laws and benefits, a measure like DOMA is certainly needed. However, individual states should be given an appropriate amount of wiggle room to ensure that their laws on non-federal issues comport with their values. The Musgrave Amendment is at fundamental cross-purposes with such an idea in that, simply put, it takes a power away from the states that they have historically enjoyed.

As conservatives, we should be committed to the idea that people should, apart from collective needs such as national defense, be free to govern themselves as they see fit. State and local governments provide the easiest and most representative avenue to this ideal. Additionally, by diffusing power across the federal and state governments, we provide impersonal checks and balances that mitigate against the abuse of power.

To be clear, I oppose any marriage save that between one man and one woman. And, I would do all in my power to ensure that such a formulation is the only one operative in my home state of Georgia. However, do I think that I can tell Alaska how to govern itself on this issue? Or California? No, I cannot. Those states are free to make their own decisions, even if they are decisions I would characterize as bad.

Furthermore, I cannot accept the proposition put forward by some that by banning same-sex marriages, but still permitting another category of legal recognition for homosexuals, we have solved any problems.

Federalism means that, unless the Constitution says otherwise, states are sovereign. This pertains to marriage. Period.

The second argument against the Federal Marriage Amendment is just as damning. We meddle with the Constitution to our own peril. If we begin to treat the Constitution as our personal sandbox, in which to build and destroy castles as we please, we risk diluting the grandeur of having a Constitution in the first place.

The Founders created the Constitution with such a daunting amendatory process precisely because it is only supposed to be changed by overwhelming acclamation. It is so difficult to revise specifically in order to guard against the fickle winds of public opinion blowing counter to basic individual rights like speech or religion.

Not cluttering the Constitution, and not setting the precedent that it can be changed to promote a particular ideology, is doubly important for us conservatives.

We know that the future is uncertain, and our fortunes unclear. I would like to think people will think like me for a long time to come, but if they do not, I fear the consequences of the FMA precedent. Could liberal activists use the FMA argument to modify the Second Amendment? Or force income redistribution? Or ban tax cuts?

Quite possibly.

Finally, changing the Constitution is just unnecessary -- even after the Massachusetts decision, the San Francisco circus, and the Oregon "licenses." We have a perfectly good law on the books that defends marriage on the federal level, and protects states from having to dilute their definitions of marriage by recognizing other states' same-sex marriage licenses.

Already, we are seeing the states affected by these developments moving to address the issue properly, using state-level methods like state supreme court decisions and state constitutional conventions. Just yesterday, the Massachusetts legislature reconvened its constitutional convention to figure out an amendment to democratically counter its state supreme court decision.

We should also take note that the recent attempts to recognize same-sex marriages do not, despite broad media coverage, prefigure any sort of revolution against traditional marriage.

In addition to the federal DOMA, 38 states prohibit same-sex marriage on a state level and refuse to recognize any performed in other states. A handful of states recognize domestic partnerships, most with only minimal benefits like hospital visitation or shared health insurance. One state authorizes civil unions and a couple of others may or may not have marriage on the horizon. Rumors of traditional marriage's untimely demise appear to be exaggerated.

And, truthfully, this is the way it should be. In the best conservative tradition, each state should make its own decision without interference from Washington. If this produces different results in different states, I say hurray for our magnificent system of having discrete states with differing social values. This unique system has given rise to a wonderfully diverse set of

communities that, bound together by *limited*, common federal interests, has produced the strongest nation on the face of the earth.

In spite of his second-term election change on the issue, I think Vice President Cheney put this argument best during the 2000 election:

> "The fact of the matter is we live in a free society, and freedom means freedom for everybody. And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard. . . . I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

I worry, as do many Americans, about the erosion of the nuclear family, the loosening influence of basic morality, and the ever-growing pervasiveness of overtly sexual and violent imagery in popularly consumed entertainment. Divorce is at an astronomical rate – children born out of wedlock are approaching the number born to matrimony. The family is under threat, no question.

Restoring stability to these families is a tough problem, and requires careful, thoughtful and, yes, tough solutions. But homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution.

Thank you again for inviting me to submit comments.